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HEADQUARTERS EIGHTH ARMY
United States Army
Office of the Staff Judge Advocate

Yokohama, Japan
8 October 1948

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UNITED STATES OF AMERICA VS NOBORU SEKI (NOBURO SEKI)

Review of the Staff Judge Advocate

1. The attached record of trial of Noboru Seki (Noburo Seki) at Yokohama, Japan, from 18 August 1947 to 22 August 1947, by a Military Commission appointed by paragraph 21, Special Orders No. 190, Headquarters Eighth Army, United States Army, dated 14 August 1947, having been referred to the Staff Judge Advocate, this review thereof is submitted to the Commanding General.

Personal Data Concerning Accused

NAME: Noboru Seki (Noburo Seki)	DATE OF CONFINEMENT: 29 April 194
AGE: 34	DATE OF ARRAIGNMENT: 18 August 1947
RESIDENCE: No. 3599, Aramaki Niiharumura, Tone-gun, Tumma Ken	PLACE OF TRIAL: Yokohama, Japan
MARITAL STATUS: Married	PERIOD OF TRIAL: 18 August 1947 to 22 August 1947
RELATIVES: Wife, 1 child, mother, brother	DATE OF SENTENCE: 22 August 1947
EDUCATION: 13 years school; graduate of Junior High School	SENTENCE: CHL 20 years
VOCATION: Army since 1935	CLEMENCY RECOMMENDED BY COMMISSION: No
MILITARY CAREER: Warrant Officer Tachikawa Military Police Unit	

2. Synopsis of Charges, Pleas, Findings, Legal Sufficiency:

<u>Charges and Specifications:</u>	<u>Pleas</u>	<u>Findings</u>	<u>Legally Sustained</u>
Charge (As amended R-3): Accused at the times and places in the specifications hereto attached, did violate the Laws and Customs of War.	NG	G	Yes
Sp 1: That on or about 9 August 1945, accused, then a warrant officer Tachikawa Kempei, 1st Det., having in his custody Staff Sgt. Serafino Marone, an American PW, did willfully and unlawfully mistreat, abuse, cause mental and physical pain and suffering and death to said PW.	NG	G	Yes
a. By permitting military personnel under his command to subject said PW to insults and public curiosity.	NG	G	Yes
b. By permitting military personnel under his command to subject said PW to a beating by the populace.	NG	G	Yes

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c. By permitting military personnel under his command and other persons then under his control to decapitate said PW.

NG G yes
except word "decapitate," substituting "participating in the decapitation of". Of excepted word NG. Of substituted words G.

Sp 2: On or about 9 August 1945 accused did willfully and unlawfully disregard and fail to discharge his duty to provide reasonable measures for the humane treatment, the safe custody and the protection of said PW:

NG G No

a. By failing to control and restrain military personnel under his command from subjecting said PW to insults and public curiosity.

NG G No

b. By failing to control and restrain military personnel under his command from subjecting said PW to a beating by the populace.

NG G No

c. By failing to control and restrain military personnel under his command and other persons then under his control from decapitating said PW.

NG G No
except the word "decapitating", substituting therefor the words "participating in the decapitation of". Of the excepted word, NG. Of the substituted words G.

3. Summary of the Evidence:

a. For the Prosecution (as to the charge and all specifications):

(1) On 8 August 1945 an American B-29 crashed near Tachikawa, Tokyo Prefecture, Honshu, Japan. Two American airmen survived the crash and were taken to the Tachikawa Kempei Tei Headquarters. The two survivors were Master Sergeant Lester C. Morris and Staff Sergeant Serafino Marone. Sergeant Morris was returned to military control and is back in the United States (Stipulation, R 7). During August 1945 Major Schichisaburo Yajima was in command of the Tachikawa Kempei Tei; Warrant Officer Yamaura was next in command; and Warrant Officer Seki, the accused, was next. Seki's section handled captured American fliers (R 16). The accused was on duty 8 and 9 August 1945 (Stipulation, R 57).

(2) Major Yajima, the Commanding Officer, was previously tried for the offenses committed against Sergeant Marone (United States vs Yajima, Case Docket No 66). He was convicted and sentenced to confinement at hard labor for life. The Commission took judicial notice of the record in the case (R 7). Prosecutions Exhibit 3 in that case entitled, "Report of Disinterment for Identification", showed that on 22 February 1946, the cremated remains of one "Unknown X-J" were disinterred by the Quartermaster Graves and Registration Company at the Shuraku-en Cemetery, about one mile northeast of Tachikawa (R 7).

(3) When the fliers had arrived at the Kempei Tei Headquarters, there were about four or five hundred people assembled there. Because of the continued air attacks the populace was enraged and wanted to stone the prisoners. Yamaura went out and tried to control them. Yajima was present with a megaphone and spoke to

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the crowd. The fliers were exhibited for about half an hour; they were not mistreated. After the exhibition, they were taken inside the Kempei Tei Headquarters for investigation by Seki (R 16, 17, 19) and were then placed in a cell (R 51).

(4) The following morning Yajima told Yamaura that since a great many people wanted to see one of the fliers, he expected to show one. He said the populace had been subjected to daily bombing, and to bolster their spirit to continue the war, he was going to show one (R 17). Yamaura suggested to him that it would be better not to do so, but he replied he had instructions on the treatment of captured fliers from the Commander of the Eastern Army and that there would be no need to worry; that there was nothing for anyone to worry about or be scared of (R 20).

(5) Yajima told Sergeant Shimura that since there were so many people surrounding the building wishing to see the prisoner of war, it would be better to show him at the school yard where there was more room, and told him to go to the school to make arrangements. Shimura went there and talked to one of the instructors (R 13). Murano, the instructor at the school, stated that he had received a phone call from the Kempei Tei stating that a flier would be shown and requesting permission to use the grounds. He gave the permission. He stated that a member of the Kempei Tei (Seki) came to look over the grounds (R 23). Shimura took Sergeant Shibasaki and four or five other Kempeis to the school ground and pointed out the place the flier was to be exhibited about ten meters from the basketball standard (R 13). Seki told Shibasaki that the PW would be exhibited to the public at the school and asked him if he had any reserve Kempeis not doing anything. About 1 p.m. there was a meeting and Seki told all people who were on duty to remain after the meeting (R 9).

(6) About 1 p.m. either Seki or Yajima sent Sergeant Major Arai to the city hall to contact the city council and request permission to use the public burial grounds at the graveyard (R 35).

(7) Seki went to the second floor of the Kempei Tei Headquarters and said one of the PWs which had been captured the day before would be shown at the schoolyard (R 51, 53). A little after 1 p.m. one of the fliers was taken out of the cell. There were two or three Kempeis with him. He was clad only in short trousers torn below the knees; he was blindfolded and his hands were tied (R 18, 23, 24). A large crowd of people followed the procession to the schoolyard (R 52).

(8) On arrival at the schoolyard, the flier was lashed by the Kempeis to a basketball standard, face toward the post, back toward the populace and hands lashed to a cross piece on the standard. Seki was in command and supervised (R 9, 11, 23, 40, 52). There was a poster near the basketball standard which read in effect, "This flier was one of the persons who bombed Tokyo, and because of the bombings, we have lost our loved ones, brothers and sisters, and you will wreak your revenge upon this person" (R 36, 52, 56). Seki faced the populace and said, "Ladies and gentlemen, you will now be permitted to beat this B-29 flier. However, each one will only strike the prisoner one time." Then the beating began (R 10). A large crowd of about 1500 gathered around the basketball standard; several hundred were lined up and as each one struck the flier, he was dismissed and others followed. They struck with a split bamboo pole. The beating lasted about an hour and a half to two hours. The Kempei controlled the crowd (R 9, 10, 23-25, 52, 61). The flier was in pain; he twitched his legs, and toward the end seemed delirious. He was given water, revived, and beaten again (R 10, 25, 54). The beating continued until it was terminated by an air raid alarm about 4 p.m. (R 10, 40, 53).

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(9) Shortly after the flier was taken from the cell, Yajima left the Headquarters and rode on horse to the school ground. He spoke to Seki and after a short time rode away. The beating continued after he left (R 9-11, 20, 36, 52). Seki was the ranking officer at the schoolyard except when Yajima was present (Stipulation, R 22).

(10) After the beating Seki ordered the flier untied; he was laid on a stretcher and carried by Kempeis to the hallway of the school. Seki was at the stretcher (R 26, 40, 53, 54). A first lieutenant was also there (R 54). Seki said the flier was to be taken to the cemetery (R 54). Kempeis carried the flier to the temple. Others followed the procession to the temple and graveyard (R 40, 45, 62, 64).

(11) On arrival at the cemetery the grave was already dug (R 40). The flier was placed at the edge of the hole. He was alive. An Air Corps lieutenant stepped forward to the hole, drew his sword, faced Seki, nodded and then decapitated the flier. He fell in the hole and the grave diggers buried him (R 40, 45, 46, 53, 62, 63). Seki was at the cemetery during the decapitation (R 40, 45, 53) and was the highest ranking Kempei Tei officer there (R 22).

(12) Seki requested Dr. Nakayama to help him fill out the death certificate. The latter, on instructions from the Kempei Tei, prepared it showing the following: "Name -- Serafino Marone; birthplace -- United States; cause of death -- completely burned; date of illness -- date B-29 crashed; date of death -- date at the graveyard; place of death -- where plane crashed." (R 63, 64).

(13) About the end of September, 1945, Sergeant Shimura received orders from Seki about disinterring the body at Shuraku-en Cemetery. He helped dig up the body at night. Yajima appeared prior to the digging and left immediately. Seki was in charge. The body was cremated; the bones and ashes taken to the temple, put in a box and interred in the same grave. A priest was present with a lantern while the body was being dug up (R 13-15, 32, 56).

(14) Seki could not have permitted the exhibition, beating and beheading of the flier in the absence of superior orders, in the opinion of several Kempeis (R 11, 37, 41, 46, 54).

b. For the Defense (as to the charge and all specifications):

(1) Kempei Yamamuro stated that one of the fliers was taken to Tokyo Kempei Headquarters; the other was beaten and mistreated and later decapitated. He went to the public school and saw the flier tied to crosspiece on a post being beaten. The only Kempei he remembered seeing there was Sergeant Major Arai. He met Yajima as the latter was entering the gate at the schoolyard on a horse. The key to the cell where fliers were retained was held by Yamaura. The Unit Commander had authority to remove fliers from the cell. Seki's section was charged with the administration of prisoners. He did not recall seeing Seki at the schoolyard (R 72-75).

(2) Kempei Kanakura stated on the morning of 9 August 1945 an Air force officer entered Tachikawa Kempei Tei Headquarters. Yajima, Yamaura and Seki were talking in his (witness') office about the flier. Witness went to the entrance of the cell when the flier was taken out; Yajima was there. The cell was opened and closed on Yajima's orders. Just before the flier was brought to the schoolyard, Seki called the Kempeis and gave them their orders. Yajima said the prisoner shall be brought out. In the afternoon Seki telephoned to Tokyo Kempei Tei Headquarters stating that one flier would be brought to Tokyo (R 76-78).

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(3) Kempei Ishihara stated the two captured fliers were brought to Kempei Tei Headquarters on 8 August 1945 and exhibited to a crowd of 500 to 600 people. Yajima and several other Kempeis were present. It was common knowledge that any B-29 flier who was captured and who could not give valuable information could be summarily executed. This information came through the Thought Control Section and they heard that the Tokyo Kempei Tei Unit Commander had authorized such action. He heard Yajima say the prisoner would be shown the next day (R 78, 79).

(4) Kempei Kozuka stated that sometime during June or July 1945, he heard there was an order from the Eastern District Kempei Headquarters that fliers who were not officers need not be taken to Tokyo Headquarters and that the unit making the capture could make disposition of the captive. He heard this both at the Tachikawa Unit and also at the Tokyo Headquarters where he was liaison agent. He never heard Yajima speak of such an order and could not recall from whom he heard it. He understood "make disposition" meant "kill". When the flier's body was dug up and cremated, he asked Yajima if he was in any danger because of the death of the flier. Yajima answered he was in no danger; that whatever he had done, he did on orders of higher authority; that he (witness) need not worry about him. The day after the body was dug up Seki came to him and said he had an unpleasant feeling after digging up the body and asked him for some sake. Witness asked Yajima for sake for Seki a number of times, but he had none. The reason he asked Yajima if he was worried was because he had heard the Occupation personnel were making investigations (R 80, 82). In his opinion Seki could not have ordered the beating and the decapitation of the flier without orders from higher authority (R 84).

(5) Nakajima, Chief of the Civilian Defense Corps, stated at the request of the Kempei Tei he sent two of his men, Inohana and Inouye, to control the crowds and traffic immediately after the fliers arrived at Kempei Tei Headquarters on 8 August. There were more than one thousand people in front of the headquarters (R 88). They controlled traffic the next day also. Inohana saw Yajima on horseback at the schoolyard while the flier was being beaten (R 90). Inouye stated Yajima told the crowd assembled in front of the Kempei Tei Headquarters, "Tomorrow you will be shown the prisoners at your leisure." The next afternoon more than one thousand people were at the school ground; the prisoner was tied hand and foot to the crosspiece on the post; the populace was individually beating the PW with a stick which the Kempei Tei had furnished. The Kempeis were supervising the beating (R 91-92).

(6) Kempei Ishikawa stated the fliers were exhibited to the public at Tachikawa Kempei Tei Headquarters for about thirty minutes on 8 August. Yajima was present with a megaphone (R 92).

(7) Konno stated he had control of the public cemetery at Shuraku-en in Tachikawa. Around noon a Kempei sergeant or sergeant major asked permission to use the general plot in the cemetery to inter an American flier. He granted the request (R 94).

(8) Major General Nagatomo stated that he was commander of the Central Area Kempei Tei Unit from April 1945 to September 1945. In June or July 1945, he received a directive under the name of Colonel Yamamura, a staff officer of Lt. General Okido, chief of Kempei Tei of all Japan, to the effect that in the future captured B-29 fliers would no longer be sent to Tokyo; that the commander would secretly confer with the Army commander of the area and follow his instructions or, with his understanding, severely dispose of them. He understood they would be executed without trial (R 95).

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(9) Lt. Col. Fujino stated that he was attached to the Eastern Kempei Tei Headquarters after April 1945. Colonel Otani (a suicide) told him about 9 August 1945 that all fliers in the hands of Kempei Tei at the end of the war must be sent back to their homes; on August 14, he told him that they should be killed because if they were sent back, there would be no telling what they might say and what might happen (R 98).

(10) Maemoto stated Yajima, the unit commander, asked him to dig up the body, and told him it was best not to talk to other people about it (R 122).

(11) The accused, having been warned of his rights (R 99), elected to take the stand and testify. He stated that during August 1945 he was a warrant officer at Tachikawa. Major Yajima was his commanding officer; Warrant Officer Yamaura was second in command, and he was third. Yamaura was in charge of the general affairs section and had charge of all matters pertaining to the coll of PWs. He (Seki) was in charge of the information section (R 100). It was also called the thought control section (R 116). His section forwarded information regarding PWs to headquarters (R 101). After the plane crashed on 8 August 1945, he returned to the M. P. compound about 6:30 p.m. The fliers were in the cell. He did not see any of the first day's exhibition. After roll call the next morning he went to his office and completed the draft of his report of the crash. About 10 a.m. he took it to Yajima. Yajima told him to hold up the report as one of the PWs was to be beaten by the populace. He (Seki) told Yajima that such a thing should not be done in view of the recognized rights of PWs under international law. Yajima replied, "No, there are numerous persons who have lost parents and children in Tokyo, Hachioji, and all over Japan who have been burned, and a terrible thing has been done at Hiroshima. People are very angry. The decisive battle for the homeland is imminent, and this must be done to raise the morale of the people. The Commanding General of the Eastern District Kempei Tei knows about this too." (R 103, 104). He took the report back with him and then went to Yamaura's room and told Yamaura the things Yajima had told him. Yamaura agreed it was not good for a PW to be beaten, as that would create an international problem. As they were conversing, Yajima came into the office. Yamaura told Yajima the PW should not be beaten. Yajima would not listen and told Yamaura the same things he had told him (Seki) (R 104). He (Seki) then returned to his office. About 11:00 a.m. a crowd of people had assembled around the headquarters demanding to see the prisoners. He reported that to Yajima and the latter said, "Tell them to go home; they will be allowed to see the prisoners of war in the afternoon." He (Seki) told the crowd that, and they gradually began to go home (R 105). About 1:00 p.m. Sgt. Major Arai was called to Yajima's office, and Yajima told him to go to the town hall for liaison work (R 106). About ten minutes later Sgt. Shimura went to Yajima's office and received orders to go to the Nishikicho Primary School (R 107). He did not know of Yajima's intention to beat the PW until about 10:00 a.m. that morning. He did not recall informing Shibasaki, or any other Kempeis below him, of Yajima's intentions between that time and 1:00 and 1:30 p.m. (R 118-120). About 2:00 p.m. he looked out and saw Yajima, Yamaura, and a number of other persons in front of the PW's cell. When the prisoner was about to be taken out, he thought he would go to the school too. Just before the prisoner was taken out, he proceeded to the school. He had not gone to the school earlier that day (R 107). He did not receive orders to go to the school (R 119). He went to the school because he wanted to help the flier. He was looking for an opportunity to get him off without being beaten (R 120). When he arrived at the school yard, Sgt. Major Arai, Shimura, and others in Arai's section were there. He cautioned Arai it would be better to arrange the crowd by separating those who desired to strike the PW and those who did not (R 108). He did not order him to arrange the crowd. Arai agreed, and he

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(Seki) assisted in arranging them. He did not think cautioning the crowd would hinder Arai in carrying out the orders he (Arai) had received from Yajima (R 120). Some of the populace had large clubs and he told Arai if the PW were struck with the large clubs he would not survive. A Japanese fencing stick of split bamboo was laid close to the standard for striking the PW (R 115). He told Arai not to use the big sticks but to use only the split bamboo stick (R 120). While pushing back the populace, getting them in order, and helping to quiet them, he (Seki) told them that each would be allowed to strike the PW one time only, and on the butt (R 116). There was a poster near the scene of the beating. Yajima had asked him (Seki) to prepare the poster about noon, but since he was not a good penman, he (Seki) suggested Arai; so Yajima had him prepare it. (R 115). About five minutes after he (Seki) arrived at the school, the flier arrived (R 108). He was taken to the basketball standard and lashed by three Kempeis (R 115). He (Seki) looked on while he was being tied, but he had no authority to command (R 119). He was the highest rank at the school yard but was not in charge (R 108). He left before the beating began, and did not see Yajima there (R 108, 121). After he arrived at Headquarters a report was received that the beating had ended, and he reported that to Yajima (R 108). Yajima said, "There is an officer who came here saying he wants to cut (behead) him." He (Seki) said that if he was supposed to supervise at the scene, he would like to be excused. Yajima told him, "Yamaura is out; no one else is here; so you go along with him. I have already ordered Sgt. Major Arai to make preparations at the scene; so there is no necessity for you to give orders. Just go along with him. The responsibility lies with the unit commander and this officer." He was told to go, so he guided him there. He heard he was an aircraft officer (R 109). On his way to the cemetery, he stopped at the school house. Shimura was there and said Arai had gone to the churchyard to make preparations. In about fifteen minutes when they were ready at the cemetery Shimura and others carried the PW on the stretcher to the cemetery (R 110, 111, 116). He (Seki) followed. When he arrived at the cemetery, Sgt. Major Arai was there; the hole was near completion. The flier was made to kneel at the edge of the grave; the officer drew his sword and cut his neck with one stroke. The laborers covered the grave. He started back (R 110). The Air Corps officer left, and he (Seki) reported the decapitation to Yajima (R 111). He returned to his room and corrected the report to show one flier sent to Tokyo Kempei Tei Headquarters. He asked Yajima what entry to make as to cause of death and Yajima told him to write, "died after coming down with a parachute." On the death certificate he said to show cause, "burns over entire body". He asked Yajima who was to make the death certificate. He (Seki) suggested Dr. Nakayama, who had been present. Yajima agreed. He (Seki) contacted Dr. Nakayama for the death certificate. Nakayama told him to come back for it later and he (Seki) sent Miyamura for it (R 112). About the middle or end of September, Yajima ordered the body disinterred. He (Seki) suggested it would be better to cremate the body (R 112). He made the suggestion two or three times about digging up the decapitated flier and giving him a regular burial before Yajima finally consented (R 117). He (Seki) was present at the disinterment (R 112).

4. Opinion

a. Motion to Strike or Combine Specifications

The accused was charged under two specifications. It was the intention of Specification 1 to charge him with personal responsibility as an active participant, and of Specification 2 to charge him under the doctrine of command responsibility for failure to protect. The word "permitting" as used in Specification 1 means "to grant leave by express consent or authorization; empower expressly" (32 Words and Phrases, Perm. Ed. 145). "As ordinarily used, the word 'permit' includes the element of assent. When used in a statute to describe an action made penal, it must be held to include that element unless there be something in the context clearly

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indicating the contrary" (32 Words and Phrases, Perm. Ed. 156). Since it was intended in Specification 1 to charge the accused as an active participant, an affirmative action is implied. No such affirmative action is implied in Specification 2. The specifications are not a duplication; they are based on different theories, even though the acts relied upon to support each specification are identical. The Commission did not know whether the evidence would sustain the first or second specification, and properly overruled the motion of the defense to strike one of the specifications (R 3) or to combine them (R 4).

b. Legal Sufficiency

(1) There can be no doubt that the decision to exhibit, beat and decapitate the flier was made by Yajima, and not by Seki. It is inconceivable that Seki, who was only third in command, could or would on his own initiative have undertaken acts of such grave import. However, inasmuch as Seki's section was directly concerned with matters pertaining the handling of captured fliers it is logical that Yajima should have called upon him to assist in carrying out the plans he had formulated for their disposition. Yajima was the master mind, and he outlined the course of action. He was the principal and an active participant in some phases; in other phases he employed Seki. Because of Seki's participation either as a principal or an accessory, he is guilty of committing the offenses alleged in Specification 1. Seki clearly aided, abetted, assisted, encouraged or advised in the unlawful mistreatment, abuse, pain and suffering, and death of the PW either by his active participation or permitting those under his command to participate in the exhibition, beating, and decapitation of the flier. The common law distinction between the principals and accessories has generally been abolished; the accessory is considered as guilty as the principal and punished accordingly. (14 Am. Jur., Crim. Law, Sec. 107).

(2) Major Yajima, the commanding officer, was previously convicted of practically the same offenses with which the accused now stands charged. In Specification 1 he was found guilty of ordering, causing and permitting the exhibition; permitting the beating, and permitting the decapitation of Staff Sgt. Marone. In Specification 2 he was found guilty under the doctrine of command responsibility for failure to protect him from the exhibition, beating and decapitation. The findings were approved by the Convening Authority, and the sentence to life imprisonment was approved and ordered executed (MCO No. 142, 20 January 1948).

(3) Although the Commission trying Yajima found him not guilty of "ordering and causing" the beating and decapitation, that does not mean that Seki did not receive orders from Yajima regarding the beating and decapitation. Seki undoubtedly acted under orders of Yajima, either express or implied. He may have received specific orders, or knowing the plan and intentions of the Commander, Seki may have proceeded to carry out his will without orders. To him the Commander's wish and desires were tantamount to orders, and constituted at least implied orders. Whether express or implied they had the effect of orders. Under SCAP rules superior orders do not constitute a defense, but may be considered only in mitigation of punishment; if justice so requires.

(4) The accused cannot establish absence of criminal intent on the ground that the facts as he saw them justified his conduct. The beating, torture and subsequent decapitation of the captured flier, in all of which he actively participated, or permitted others to participate, were clearly a violation of international law, and were of such a diabolical nature as to shock the conscience of decent men. An order which is illegal in itself, and not justified by the rules and usages of war, or which

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is, in its substance, clearly illegal; so that a man of ordinary sense and understanding would know as soon as he heard the order given that it was illegal, will afford no protection for a homicide, provided the act with which he may be charged has all the ingredients in it which may be necessary to constitute the same crime in law (26 Am. Jur. Homicide, Sec. 72). Seki was a man of more than ordinary sense and understanding. He was in charge of the Thought Control or Information Section and especially trained to know the rights of prisoners. He was well versed in international law, and by his own admission knew that the treatment proposed by Yajima was in violation of international law. He did not act in good faith; his acts were entirely unjustified, apart from the orders, he may have received. He cannot plead "obedience to superior orders" to escape liability. The evidence is legally sufficient to support the findings of Specification 1.

(5) Article I, Annex to Fourth Hague Convention, 1907, lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates" (emphasis supplied). This imposes upon the commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of specified acts which are violations of the law of war; and charges him with personal responsibility for his failure to take such measures when violations result (Application Yamashita, 66 S Ct. 340, Sec. 14, 15). The unit that had the flier in its custody was the Tachikawa Kempei Tei. It was commanded by Major Yajima, not Warrant Officer Seki. "The decision as to the specific course of action is the responsibility of the commander alone. While he may accept advice and suggestions from any of his subordinates, he alone is responsible for what his unit does or fails to do" (Par. 120, FM 100-5) (emphasis supplied). Seki cannot be held under the doctrine of command responsibility for acts which the commander had ordered, or which were committed in the commander's presence and with his approval. To hold a subordinate responsible for the acts of his commander would be completely reversing the accepted and fundamental principles of command. The findings of guilty of Specification 2 should be disapproved.

c. The accused was ably represented by American Advisory Counsel. The latter was assisted by individual Japanese counsel. The accused was given adequate opportunity to present any matters he desired in his own defense. He took the stand and testified in his own defense. There is no evidence that the accused was insane or otherwise incompetent at the time of trial or at the time of the commission of the alleged offenses. Insanity was not an issue.

d. The Commission was legally constituted. The sentence was authorized for violation of the laws of war. The Commission had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The record is legally sufficient to support the findings as recommended herein, and the sentence imposed by the Commission.

5. Recommendations:

a. The findings of guilty of Specification 1 and the charge should be approved. The finding of guilty of Specification 2 should be disapproved.

b. No petitions for clemency were filed.

c. The brutal beating and other abuses inflicted upon the victim show the malignant spirit of the accused. The flier was beaten into unconsciousness, revived with water, and beaten again. It took an air raid alarm to terminate the beating. For the offenses

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for which he is to be sentenced justice demands that the accused be severely punished. The Commission imposed a sentence of confinement at hard labor for twenty (20) years. The sentence is not excessive and it is recommended that it be approved. In accordance with the established policy, owing to the length of time the accused has spent in confinement prior to date of sentence, it is recommended that one (1) year and one (1) month of the sentence be remitted.

6. Action

Attached hereto is a form of action designed to carry into effect the above recommendations.

F. R. UNDRITZ
Lt. Colonel INF
Asst. Staff Judge Advocate

I concur in general. However, as to Specification 2 it should be noted that in the absence of Major Yajima (who only appeared briefly at the hearing and not at all at the beheading) the accused was in command and control. He had the power to restrain his subordinates. Yet he allowed them to continue in what he knew was an illegal act. If the reviewer's theory were accented, Yajima himself could have escaped on the theory that higher authority desired the death of the fliers who were captured. Approval of the findings as to both Specifications and the Charge is recommended. An alternate proposed action to implement this recommendation is attached.

ALLAN R. BROWNE
Lt Col JAGD
Army Judge Advocate